

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

IN RE: COMPLAINT AND PETITION	§	
FOR RELIEF OF BELLSOUTH	§	
TELECOMMUNICATIONS, LLC d/b/a	§	
AT&T SOUTHEAST d/b/a AT&T	§	DOCKET NO. 2011-304-C
SOUTH CAROLINA v. HALO	§	
WIRELESS, INCORPORATED FOR	§	
BREACH OF THE PARTIES'	§	
INTERCONNECTION AGREEMENT	§	

HALO WIRELESS, INC.'S OPPOSITION TO PETITION TO INTERVENE

Halo Wireless, Inc. ("Halo" or the "Debtor"), defendant in the above captioned matter, hereby files its Opposition to the Petition to Intervene (the "Petition") filed by the South Carolina Telephone Coalition ("SCTC") and respectfully represents as follows:

Summary

The Petition should be denied because SCTC has failed to assert any claim for relief of its own and has not alleged sufficient details or grounds to justify intervention under Rule 24 of the South Carolina Rules of Civil Procedure ("SCRCP"). While Halo contends that the instant matter actually raises issues and seeks relief which the South Carolina Public Service Commission ("SC PSC") has no jurisdiction to adjudicate, on its face the complaint filed by Bellsouth Telecommunications, LLC ("Bellsouth") in this matter still purports to assert a purely bilateral dispute arising out of an interconnection agreement between Halo and Bellsouth in which SCTC has no right to involve itself. In any event, based on the few details that SCTC did provide, it is clear that SCTC's interests are already adequately represented by Bellsouth in this matter and SCTC seeks the same ultimate relief sought by Bellsouth. Accordingly, there are no legitimate grounds for permitting SCTC to participate in this proceeding, and the Petition should be denied.

Background

1. Halo is a telecommunications carrier that provides wireless services pursuant to its Radio Station Authorization (“RSA”), a nationwide license granted by the FCC, which permits the Debtor to register and operate fixed base stations and to support mobile, portable and fixed subscriber stations throughout the country. Halo’s RSA classifies the Debtor as a “common carrier.”

2. On March 29, 2010 and April 5, 2010, respectively, Halo and Bellsouth executed an MFN Agreement (the “ICA”) dated March 25, 2010, in which Halo adopted the 251/252 wireless interconnection agreement as executed between Bellsouth and T-Mobile USA, Inc. and dated May 8, 2003. Pursuant to Section 252(e) of the Federal Telecommunications Act of 1996 (the “Act”), the ICA was submitted to the Commission and was approved. As a result, Halo provides “interconnected service” as defined in § 332(d)(2) of the Act. Thus, as a matter of law, Halo is a provider of “commercial mobile service” as defined in § 332(d)(1) of the Act and is a “Commercial Mobile Radio Service” (“CMRS”). *See* 47 C.F.R. § 20.3.

3. Shortly after they began receiving traffic from Halo through Bellsouth, various local exchange carriers across the country began demanding that Halo pay them access charges and other charges for the termination of that traffic and sent various demand letters to Halo making similar demands. However, Halo rejected the demands because they were procedurally improper, made demands for access charges that were not due and other charges that were not due absent compliance with 47 C.F.R. § 20.11.

4. On July 29, 2011, BellSouth filed its complaint (the “Complaint”) with the South Carolina PSC initiating the instant proceeding. The Complaint alleges various breaches of the ICA

by Halo and asserts various claims for relief that raise federal issues (the “FCC-exclusive issues”)¹ over which Halo contends the South Carolina PSC has no jurisdiction.²

5. On August 8, 2011, the Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division (the “Bankruptcy Court”), Case No. 11-42464 (the “Bankruptcy Case”). On September 1, 2011, Halo filed Adversary Proceeding No. 11-04160, *Halo Wireless, Inc. v. The Livingston Telephone Company, et al.*, in the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division (the “Central Adversary”) naming various similarly situated parties involved in similar disputes over the same FCC-exclusive issues with Halo.

6. In connection with the filing of the Bankruptcy Case and the Central Adversary, Halo removed this proceeding to the United States Bankruptcy Court for the District of South Carolina pursuant to 28 U.S.C. §1452(a). However, the matter was remanded on December 1, 2011.

Law and Argument

7. As a preliminary matter, SCTC’s Petition should be summarily denied because SCTC has failed to meet the basic procedural requirements of the rules governing intervention. Specifically, SCRCP 24(c) requires that a party desiring to intervene in a proceeding serve a motion to intervene on the parties to the proceeding and that the motion “shall be accompanied by

¹ The Bellsouth’s Complaint implicates the following FCC-exclusive issues: 1) Whether Halo’s services constitute a wireless service?; 2) Whether Halo is a CMRS provider?; 3) Whether the traffic Halo sends to Bellsouth is “Inter-MTA” or “Intra-MTA”?; 4) Whether access charges apply for Halo’s traffic and if so what access charge rules apply?; and 5) Whether a CMRS can provide service to an Enhanced Services Provider (ESP)?

² Halo asserts that the South Carolina PSC cannot assert jurisdiction over the FCC-exclusive issues implicated by the Complaint because they are federal questions that fall within the FCC’s exclusive original jurisdiction and the FCC is the Congressionally-mandated “first decider” for these issues. *See American Electric Power Co., Inc., et al. v. Connecticut et al*, 131 S. Ct. 2527, 2539, 180 L. Ed. 2d 435 (2011).

a pleading setting forth the claim or defense for which intervention is sought.” SCRCP 24(c). In this case, SCTC has not complied with the requirement of SCRCP 24(c) to accompany its request to intervene with a pleading setting forth any actual claim of its own, and SCTC’s Petition does not allege any such claim. Instead, SCTC merely asserts that it may intervene as of right because its rights are affected by the proceeding and that it “generally agrees with the relief [Bellsouth] seeks,” and supports Bellsouth’s “request to terminate its interconnection agreement with Halo. *See* Petition, p. 4. SCTC’s vague assertions without any accompanying pleadings or specific allegations do not provide sufficient factual details to show it is entitled to relief or to provide fair notice of any actual claim that it might have. Accordingly, SCTC’s Petition is defective and should be denied. In addition to being procedurally defective, the allegations in SCTC’s Petition also highlight the substantive reasons why SCTC’s request to intervene is improper under the Federal Telecommunications Act and why it is not entitled to intervene either permissively or as of right under SCRCP 24.

8. Although Halo contends that Bellsouth’s Complaint in this matter actually raises the FCC-exclusive issues and seeks relief which the SC PSC has no jurisdiction to adjudicate³, the fact remains that Bellsouth’s Complaint still purports to assert a purely bilateral dispute arising out of an interconnection agreement between Halo and Bellsouth to which SCTC is a complete stranger and in which it has no right to involve itself. The ICA in question has already successfully gone through the approval process set forth in 47 U.S.C. § 252(e)(1), in which SCTC could have sought to participate, but did not, and has been in effect for well over a year. Section 252(e)(2) does not contemplate challenges to existing ICAs in a state commission, nor does it grant state commissions

³ In addition to implicating the FCC-exclusive issues numerated in footnote 1 above, Bellsouth’s Complaint is seeking a ruling, and proceeding on the basis, that access charges are due from traffic delivered to Halo from one of its customers, Transcom Enhanced Services, Inc., even though two separate courts of competent jurisdiction, on four separate occasions, have ruled that the relevant traffic is ESP traffic, and therefore *exempt* from access charges.

the authority to overturn previous determinations. Indeed, under Section 252(e)(4), state commissions are divested of their authority to reject a negotiated ICA 90 days after submission. Permitting SCTC to participate in this proceeding and assert that the ICA should be terminated because of the alleged affect on SCTC is, in effect, a request to appeal the approval of the ICA. Because of the statutory deadline in Section 252(e), the SC PSC cannot turn back the clock and reopen the Section 252(e)(1)-(2) review process. Otherwise, Section 252(e)(4) would be rendered meaningless. Instead, Section 252(e)(6) establishes the procedure to challenge a prior commission decision to approve an ICA, and SCTC's rights to challenge the approval of the ICA at this stage, if any, are limited by that section. Accordingly, SCTC's request to intervene in this matter is improper under federal law and its Petition should be denied.

9. SCTC's proposed intervention under SCRCP 24 is also improper. SCRCP 24(a) limits intervention as of right to: "(1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." SCRCP 24(a). SCRCP 24(a) is inapplicable because SCTC has not cited any statute that confers any unconditional right to intervene upon SCTC, and indeed no such statute exists.

10. Further, SCTC's claims that its rights are affected by the instant proceeding are not dispositive of whether SCTC can intervene under SCRCP 24(a) because its interests are adequately represented by BellSouth. As Courts in South Carolina have recognized, "[w]hen an applicant for intervention and an existing party have the same interests or ultimate objective in the litigation a presumption arises that its interests are adequately represented and the application should be

denied unless a showing of inadequate representation is made by demonstration of adversity of interest, collusion, or nonfeasance.” *S. Carolina Tax Comm'n v. Union County Treasurer*, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988).

11. In the present case, although SCTC asserts that it has independent rights and interests, which it does not believe are adequately protected by Bellsouth, it does not provide any details as to how those rights and interests will not be protected by Bellsouth, who is vigorously seeking the same ultimate objective of SCTC in this proceeding, *i.e.* termination of the ICA. Indeed, as noted above, SCTC has expressly acknowledged that it “generally agrees with the relief [Bellsouth] seeks,” and supports Bellsouth’s “request to terminate its interconnection agreement with Halo.” *See* Petition, p. 4. Because there is no dispute that Bellsouth and SCTC have the same ultimate objective, SCTC was required to show that Bellsouth had some adversity of interest, collusion, or nonfeasance. *See S. Carolina Tax Comm'n*, 295 S.C. at 260. However, SCTC has failed to do so and the record of this matter clearly shows that Bellsouth is actively pursuing its claims and that there is no adversity of interest against SCTC or collusion with Halo. Thus, SCTC is not entitled to intervention of right.

12. SCTC should not be allowed to permissive intervene because it has neither requested nor referenced permissive intervention under SCRCP 24(b), in its Petition. However, even if this Court is, nonetheless, inclined to examine whether SCTC is entitled to permissively intervene, the Court should not allow SCTC to permissively intervene because SCTC has failed to demonstrate any legitimate basis for permissive intervention under SCRCP 24(b). SCRCP 24(b) permits the court to exercise its discretion to permit intervention, “(1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.” SCRCP 24(b). SCRCP 24(b) also requires that “[i]n

exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* Additionally, South Carolina courts have held that “permissive intervention should be allowed only where the prospective intervenor has a cause of action or defense it could bring or assert. *S. Carolina Tax Comm’n v. Union County Treasurer*, 295 S.C. 257, 263, 368 S.E.2d 72, 76 (Ct. App. 1988).

13. SCRCP 24(b) is inapplicable because SCTC has not cited any statute that confers any conditional right to intervene upon SCTC, and indeed no such statute or conditions exist. SCRCP 24(b) is also inapplicable because, although SCTC alleges that it has interests that have questions of law and fact in common with the claims asserted by Bellsouth in this matter, SCTC has not asserted, and does not, in fact, have any claims of its own. *See S. Carolina Tax Comm’n*, 295 S.C. at 263. As noted above, the only interests SCTC claims will be affected are already being adequately represented by Bellsouth, who seeks the same ultimate relief as SCTC.

14. Regardless, SCTC should not be permitted to intervene because its participation as a full party in this matter will unduly delay or prejudice the adjudication of the rights of Halo. Permitting SCTC to intervene will literally double the time and resources required by Halo in this matter, as Halo will no doubt have to respond to invasive discovery from SCTC and will have to respond to additional pleadings and witnesses proffered by SCTC.⁴ Allowing SCTC, who is a complete stranger to the ICA and is not directly interconnected with Halo, to participate in a proceeding, when its interests and ultimate relief sought are already adequately being represented by Bellsouth is thus prejudicial and improper on its face. Accordingly, the SCTC’s Petition should be denied and SCTC should not be permitted to intervene in this matter.

Dated this 12th day of January, 2012.

⁴ For this reason, Halo reserves the right to seek relief from the existing scheduling order if the Petition is granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Opposition to the Petition to Intervene was served via regular mail on the following counsel of record on this the 12th day of January, 2012:

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